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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1994

STUART A. BELL and CHARLES A. TISCHLER,
Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE RIGHT TO COUNSEL AND THE DUE PROCESS RIGHTS OF THE PETITIONERS WERE VIOLATED BY A DECISION OF THE PENNSYLVANIA SUPREME COURT WHICH REVERSED THE DECISION OF THE TRIAL COURT WHICH FOUND A MANDATORY MINIMUM DRUG SENTENCING STATUTE TO BE UNCONSTITUTIONAL, WHEN THE DECISION TO REVERSE WAS BASED ON A POINT NEVER RAISED OR BRIEFED BY ANY OF THE PARTIES?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The parties to this proceeding are the Petitioners, Stuart A. Bell and Charles A. Tischler, the Respondent, Commonwealth of Pennsylvania, and the Attorney General of the Commonwealth of Pennsylvania as Intervenor.

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IN THE

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October Term, 1994

No. _____

STUART A. BELL and CHARLES A. TISCHLER,
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vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Pennsylvania Supreme Court entered in this matter on July 25, 1994.

OPINIONS BELOW

The July 25, 1994 Opinion of the Pennsylvania Supreme Court, whose judgment is herein sought to be reviewed, is reported at 645 A.2d 211 (1994) and is reprinted and attached to this petition as Appendix "A". The prior Opinion of the Common Pleas Court of Allegheny County, Pennsylvania, also reprinted and attached hereto as Appendix "B" was reported as Case Nos. CC 9008146, 9008151, 9008122, and 9001149, all of the Criminal Division of the Court of Common Pleas of Allegheny County.

STATEMENT OF JURISDICTION

1. The date of the Pennsylvania Supreme Court Order and Opinion sought to be reviewed is July 25, 1994.

2. Petitioners' Application for Reargument was denied by the Pennsylvania Supreme Court on September 13, 1994.

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Section of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves a portion of the Sixth Amendment to the Constitution of the United States which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

This is a criminal case brought by the Commonwealth of Pennsylvania against Petitioners Stuart A. Bell and Charles A. Tischler. Bell and Tischler were arrested in 1990 in Allegheny County, Pennsylvania, and charged with possession, possession with intent to deliver, and delivery of in excess of 50 pounds of marijuana. On September 11, 1991, the Petitioners were found guilty of these charges.

The Pennsylvania legislature had shortly before 1990 passed a mandatory minimum sentencing statute found at 18 Pa.C.S. §7508(a)(1)(iii) which was arguably applicable to Petitioners' cases. This statute provided as follows:

> (a) General rule—Notwithstanding any other provisions of this or *any other act to the contrary,* the following provisions shall apply: (emphasis added)
>
> > (1) A person who is convicted of violating section 13(a)(14) or (2) of the act of April 14, 1972 (P.I. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, where the controlled substance is marijuana shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection . . .
> >
> > > (iii) upon conviction when the amount of marijuana involved is at least 50 pounds: five years in prison and a fine of $50,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity.

Approximately 20 years earlier the Pennsylvania legislature had passed a Controlled Substance Act which provided the following penalty for delivery of marijuana:

> (f) Any person who violates clause (12), (14) or [clause] (3) of subsection (a) with respect to: . . .
>
> (2) Any other controlled substance or counterfeit substance classified in Schedule I, II, or III, is guilty of a felony and upon conviction thereof shall be sentenced to imprisonment not exceeding five years, or to pay a fine not exceeding fifteen thousand dollars ($15,000), or both.

Consequently, a situation now existed where the "*maximum*" penalty for marijuana in Pennsylvania was five years, and the mandatory "*minimum*" penalty for marijuana in Pennsylvania was also five years.

This was made more complicated by virtue of the fact that for close to 100 years there existed a "fundamental rule" of sentencing in Pennsylvania requiring that every sentence have a minimum which may not exceed one-half of the maximum. This rule is found in 42 Pa.C.S. §9756(b), which reads as follows:

> (a) General rule.—In imposing a sentence of total confinement the court shall at the time of sentencing specify any maximum period *up to the limit authorized by law* and whether the sentence shall commence in a correctional or other appropriate institution.
>
> (b) Minimum sentence.—The court shall impose a minimum sentence of confinement *which shall not exceed one-half of the maximum sentence imposed.* (emphasis supplied).

This fundamental rule means that if a particular crime in Pennsylvania carries a maximum sentence of five years, and the Court wishes to impose the maximum, he or she must include a minimum sentence of no more than 2½ years. Therefore, while the sentence could be 1 to 5, or 2 to 5, it cannot be more than 2½ to 5.

Obviously, if, as the two Pennsylvania marijuana statutes indicate, both the maximum and the minimum is five years (for amounts in excess of 50 pounds), the fundamental rule of sentencing referred to above and found in 42 Pa.C.S. §9756(b), cannot be carried out. Consequently, if, the newer statute (by virtue of rules of statutory construction) repealed the older statute, in that they appear inconsistent, then arguably, any sentence at all would be all right, even 200 to 400 years, since there is no maximum and any sentence is okay as long as it has a minimum of at least 5 years.

Therefore, Bell and Tischler filed pretrial motions challenging the constitutionality of the mandatory sentencing provisions of 18 Pa.C.S. §7508(a)(1)(iii).

Petitioner argued, *inter alia*, that a sentencing statute that gives a defendant no idea of what possible penalty he was facing violated due process.

The prosecutor agreed that it is true that in Pennsylvania, for a sentencing statute to be constitutional, it must have a maximum and a minimum which is no more than one-half the maximum, he nevertheless argued that this new mandatory minimum statute was constitutional in that it had an implied maximum of 10 years.

The defense, the prosecution, and the Trial Court all agreed that the new 5 year mandatory minimum was inconsistent with the old 5 year maximum and thus, the old statute was repealed.

The Trial Court agreed with both the defense and the prosecution in concluding that a statute, to be valid in Pennsylvania and not run afoul of due process, must have a maximum and a minimum which is no more than half the maximum. The Trial Court disagreed, however, with the prosecution's position that there was an implied maximum here of 10 years. It held that there was no maximum.

Consequently, the Court agreed with the defense and held the statute to be unconstitutional.

The Commonwealth appealed this decision directly to the Pennsylvania Supreme Court, who by statute, hears appeals from Trial Court decisions declaring state statutes to be unconstitutional. (See 42 Pa.C.S. §722(7)). Therefore, this was not a discretionary appeal.

Based on the lower court's ruling and the prosecution's concessions, all parties assumed, briefed, and argued essentially one issue: Inasmuch as all Pennsylvania penal statutes require a maximum sentence and a minimum which is no greater than one-half the maximum, and inasmuch as the new 5 year mandatory minimum repeals the old 5 year maximum statute, can the new 5 year minimum statute be read to somehow include the necessary maximum and minimum and survive this constitutional attack.

The defense said no, and the prosecution said yes.

The Pennsylvania Supreme Court, however, ignored the position of the defense, the prosecution, and the Trial Court, and reversed the Trial Court's decision striking down the statute on an issue *never raised, briefed, or argued by the lower court or any of the parties.*

The Pennsylvania Supreme Court ruled that while the defense is right that this new mandatory minimum 5 year statute cannot be read to allow for a maximum sentence and a minimum which is no more than half the maximum, that's okay. It's okay, the Court ruled, because we are creating an exception to the clear language of 42 Pa.C.S. §9756(b) which requires a maximum and minimum of no more than half the maximum.

The exception is that in this one situation, contrary to every other penal statute in Pennsylvania, where a person is convicted of in excess of 50 pounds of marijuana, both his minimum and maximum sentence is five years. Therefore, the Pennsylvania Supreme Court held, the problem is solved.

The issue being raised before this Court was first raised in the Application for Reargument which was filed by Petitioners following the Pennsylvania Supreme Court's decision. This was the first time this issue could be raised in that it was only after the State Supreme Court's Opinion that it became an issue.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted Because The Pennsylvania Supreme Court Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The issue in this case is whether a state appellate court, in a non-discretionary appeal, can, consistent with due process and the Sixth Amendment, reverse a trial court decision which declared a criminal statute unconstitutional, when the petitioners are given no opportunity to brief or argue the reason upon which the Court based its reversal.

As stated in the somewhat complex statement of facts, all of the parties and the Trial Court agreed upon the basic underlying premise involved regarding the validity of this sentencing statute. All parties and the lower court agreed that a sentence had to have a maximum and a minimum that was no more than one-half the maximum. The only issue was whether the statute in question provided for such a sentence.

Briefs totalling several hundred pages were filed and lengthy arguments were held with various *amici* and intervenors. The Court not only never raised the issue upon which they decided the case during argument, but in addition, never communicated to counsel at any time pre or post argument to submit something on this issue because they were considering it.

Petitioners recognize the well entrenched principle that an Appellate Court can affirm for a reason not part of the original decision by the lower

court or for a reason other than those advanced by the parties. *Commonwealth v. Hines,* _____ Pa. _____, 336 A.2d 280 at 282 n.3 (1975).

But, counsel has found no law that allows for a *reversal* in a constitutional case for reasons that a criminal defendant has had no opportunity to ever once discuss, brief or argue. Petitioners' position is that when such a situation occurs, as it did here, Petitioners are deprived of both their right to due process as well as their Sixth Amendment right to assistance of counsel for their defense.

Petitioners recognize that this Court has held, as early as 100 years ago, that the Federal Constitution does not require a state to provide appellate courts or appellate review. *Blackridge v. Perry,* 417 U.S. 21, 40 L.Ed.2d 628, 94 S.Ct. 2098 (1973); *Griffin v. Illinois,* 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956); *McKane v. Durston,* 153 U.S. 684, 38 L.Ed. 867, 14 S.Ct. 913 (1894).

But, this Court, in the case of *Evitts v. Lucey,* 469 U.S. 387, at 393, 83 L.Ed. 82, 105 S.Ct. 830 at 834 (1985), after acknowledging that there is no constitutional right to an appeal, held:

> Nonetheless, if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' *Griffin v. Illinois,* 351 U.S., at 18, 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.

There is no question but that Pennsylvania has created appellate courts as "an integral part of the . . . system . . .". *Id.* at 469 U.S. 393, 105 S.Ct. 834. The

right in Pennsylvania to have a conviction and sentence reviewed through appeal is not only recognized by the Pennsylvania Rules of Appellate Procedure (Rule 341(a)), the Judicial Code, (42 Pa.C.S. §101 *et seq.*) and case law (*Commonwealth v. Pfaff,* 477 Pa. 461, 38 A.2d 1179 (1978)), but is also a right guaranteed by Article 5, §9 of the Pennsylvania Constitution.

And, where there is a right to appeal by a state, this Court has held that the appeal must be more than "a meaningless ritual . . ." *Evitts v. Lucey, supra,* 469 U.S. at 393, 105 S.Ct. at 834.

This Court in *Evitts, supra,* 409 U.S. at 395, 105 S.Ct. at 838, in analyzing Trial Due Process rights to Appellate Due Process rights, wrote that:

> Because the right to counsel is so fundamental to a fair trial the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair trial.

This Court went on to hold that this same compelling logic applies to one's appellate rights as well.

Recognition by this Court of a criminal defendant's right to due process in an appeal along with a right to an attorney who is able to assist the defendant in that appeal, together loom very large in the instant situation.

Of what worth is the right to appeal guaranteed to the petitioners when the decision is essentially decided outside of the adversary system on a point that was never raised, briefed or argued, and on which, consequently, their attorneys were unable, through no fault of their own, to assist them.

In *Anders v. California,* 386 U.S. 738, at 744, 87 S.Ct. 1396 at 1400 (1967), this Court held that the "constitutional requirement of substantial equality and fair process can only be obtained where counsel acts in the role of an active advocate."

In the matter before this Court, counsel for Petitioners, at least before the Pennsylvania Supreme Court, was relegated to the role of "advocate" in name only.

Our system of justice is an adversary one, and not one in which we must trust the courts to do the right thing without input from the litigants. Although many jurists may have the wisdom of Solomon, it has long been understood that counsel for the parties are entitled to offer their views and positions on the specific points before the Court.

This Court in *Evitts v. Lucey, supra,* 469 U.S. at 396, 105 S.Ct. at 836, wrote as follows:

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel

> is unable to provide effective representation is in no better position than one who has no counsel at all.

While this language was written to support the notion that where there is a right of appeal, the defendant is entitled to effective assistance of counsel in that appeal, its logic is compelling here.

Of what use is an appeal and counsel to represent you in that appeal, when the Court reverses a constitutional decision without giving the parties *and their counsel* the opportunity to brief and argue that point upon which it ultimately decides the case. That is precisely what occurred here.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully pray that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

JUDGMENTS AND OPINION OF THE PENNSYLVANIA SUPREME COURT DATED JULY 25, 1994

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 0035 W. D. APPEAL DOCKET 1992

Appeal from the Judgment of Sentence of the Court of Common Pleas of Allegheny County, Criminal Division, Entered on November 1, 1991, at No. CC9008151.

ARGUED: March 7, 1994

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

STUART A. BELL.

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the COURT OF COMMON PLEAS OF COUNTY be, and the same is, hereby reversed and remanded for resentencing in accordance with this opinion.

/s/ CAROL B. STEPHANY
Chief Clerk

DATED: July 25, 1994

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 0036 W. D. APPEAL DOCKET 1992

Appeal from the Judgment of Sentence of the Court of Common Pleas of Allegheny County, Criminal Division, Entered on November 1, 1991, at No. CC9008122.

ARGUED: March 7, 1994

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

CHARLES A. TISCHLER.

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the COURT OF COMMON PLEAS OF COUNTY be, and the same is, hereby reversed and remanded for resentencing in accordance with this opinion.

/s/ CAROL B. STEPHANY
Chief Clerk

DATED: July 25, 1994

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 0022 E. D. APPEAL DOCKET 1993

Appeal from the Judgment of the Superior court, No. 03285, Philadelphia, 1991, filed July 13, 1992, Affirming Judgment of Sentence of the Court of Common Pleas of Chester County, Criminal Division, entered October 8, 1991 at 1848-90

ARGUED: March 7, 1994

COMMONWEALTH OF PENNSYLVANIA,

v.

MICHAEL J. LITZENBERGER, *Appellant.*

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the COURT OF COMMON PLEAS OF COUNTY be, and the same is, hereby reversed and remanded for resentencing in accordance with this opinion.

/s/ CAROL B. STEPHANY
Chief Clerk

DATED: July 25, 1994

[J-49-1994]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN/EASTERN DISTRICTS

No. 35 Western District Appeal Docket 1992

Appeal from the Judgment of Sentence of the Court of Common Pleas of Allegheny County, Criminal Division, Entered on November 1, 1991, at No. CC9008151.

ARGUED: March 7, 1994

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

STUART A. BELL,
Appellee.

No. 36 Western District Appeal Docket 1992

Appeal from the Judgment of Sentence of the Court of Common Pleas of Allegheny County, Criminal Division, Entered on November 1, 1991, at No. CC9008122.

ARGUED: March 7, 1994

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

CHARLES A. TISCHLER,
Appellee.

No. 22 Eastern District Appeal Docket 1993

Appeal from the Judgment of the Superior Court, No. 03284, Philadelphia, 1991, filed July 13, 1992, Affirming Judgment of Sentence of the Court of Common Pleas of Chester County, Criminal Division, entered October 8, 1991 at 1848-90

ARGUED: March 7, 1994

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

MICHAEL J. LITZENBERGER,
Appellant.

OPINION

JUSTICE ZAPPALA DECIDED: JULY 25, 1994

These consolidated appeals challenge the constitutionality of the mandatory minimum sentencing statute for marijuana trafficking set forth at 18 Pa.C.S. §7508(a)(1)(ii) and (iii). Because we find that this provision can be interpreted consistently with other statutes in such a way as to provide a maximum sentence for the offenses, we reject the notion that it is impermissibly vague and violates the due process clause of Article 1, Section 9 of the Pennsylvania Constitution. The different factual and procedural backgrounds of these cases shall be set forth separately.

Commonwealth v. Litzenberger

On March 21, 1990, postal authorities in Tucson, Arizona concluded that a package addressed to Michael Litzenberger and delivered to the Post Office for express delivery met their informal profile of packages containing illicit drugs. In particular, the package was large (thirty-four pounds), heavily taped, and the return address contained a fictitious company name and address. The postal authorities therefore detained the package and obtained a narcotics dog. Although the dog did not "alert" to the package, he "showed interest in it." The postal authorities continued to treat the package as if it might contain contraband and delayed its delivery for a total of forty-four hours.

During the delay, the package was re-routed to Camden, New Jersey, and authorities there were notified of the package's suspicious nature. While the package was en route between Tucson and Camden, it was somehow ripped and the tape had become sufficiently loose to allow the odor of marijuana to escape. The postal inspector in Camden noticed the odor and brought in another narcotics dog who "alerted" to the package. After a controlled delivery of the package, Litzenberger was arrested. A forensic scientist later tested the contents of the package and determined that it contained 25.7 pounds of marijuana.

Following a non-jury trial, Litzenberger was convicted of possession,[1] possession with intent to deliver marijuana,[2] and conspiracy[3]. He was

---

[1]. 35 P.S. §780-113(a)(16).

[2]. 35 P.S. §780-113(a)(30).

[3]. 18 Pa.C.S. §903(a)(1) and (2).

sentenced to three to six years imprisonment on the possession with intent to deliver conviction pursuant to 18 Pa.C.S. §7508(a)(1)(ii) and was fined $15,000. He was also sentenced to a concurrent term of imprisonment of eleven and one-half to twenty-three months for the criminal conspiracy conviction. Litzenberger filed a Motion for Reconsideration of Sentence, which was denied by the trial court. Litzenberger subsequently appealed to the Superior Court, contending that the trial court failed to suppress evidence which was gained by an unlawful search and seizure; that the Commonwealth failed to comply with the notice provision in §7508(b); and that §7508 was unconstitutional as applied to marijuana cases where the total weight of the substance is less than 1,000 pounds. The Superior Court affirmed his convictions, finding no merit to the suppression issue, and holding that his sentence, pursuant to the mandatory minimum set forth in §7508, was proper. We granted allocatur only as to the sentencing issues.

Commonwealth v. Stuart Bell and
Commonwealth v. Tischler

On September 11, 1991, following a bench trial, Stuart Bell and Charles Tischler were convicted of possession of 116 pounds of marijuana with intent to deliver.[4] The Commonwealth gave timely notice of its "intention to proceed" under the mandatory sentencing provisions established by 18 Pa.C.S. §7508. Bell and Tischler thereafter filed Motions to Bar Imposition of Mandatory Sentence, which were granted by the Court of Common Pleas of Allegheny County.[5] The court found that although the

[4]. 35 P.S. §780-113(a)(30).

[5]. *Commonwealth v. Bell*, 12 D.& C. 4th 275 (1991).

mandatory sentencing provision set forth in §7508(a)(1)(iii) was applicable to the cases, the provision was in direct contradiction to the sentencing scheme long established by the legislature. It further held that 18 Pa.C.S. §7508(1)(a)(iii), in requiring the imposition of a mandatory minimum sentence without an explicit limitation on the maximum sentence, is void for vagueness and denies the defendants due process of the law, which is guaranteed by Article 1, Section 9 of the Pennsylvania Constitution and the Fifth and Fourteenth Amendments of the Constitution of the United States.

After the denial of post-trial motions, the defendants proceeded to sentencing on November 1, 1991. The court granted reconsideration of the previous ruling, but again decided not to apply the mandatory minimum sentence of §7508(1)(a)(iii). The court then sentenced each defendant to a term of imprisonment of one to two years, with probation of five years and a fine of $50,000, plus costs. The Commonwealth filed a timely Motion to Modify Sentence, which was denied. We have jurisdiction over the matter pursuant to 42 Pa.C.S. §722(7), which provides that our Court has exclusive jurisdiction of appeals from final orders of the court of common pleas when that court holds a statute invalid as repugnant to the Constitution of the United States or the Pennsylvania Constitution.

Discussion

Three statutes affect sentencing in cases involving illegal delivery and/or possession of marijuana with the intent to deliver. The provisions challenged as unconstitutional in the instant cases are 18 Pa.C.S. §7508(a)(1)(ii) and (iii). Those sections provide in pertinent part as follows:

§7508. Drug trafficking sentencing and penalties

(a) General rule.—*Notwithstanding any other provisions of this or any other act to the contrary,* the following provisions shall apply:

(1) A person who is convicted of violating section 13(a)(14), (30), or (37) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Devise and Cosmetic Act, where the controlled substance is marijuana shall, upon conviction, be sentenced to a *mandatory minimum term of imprisonment* and a fine as set forth in this subsection:

* * *

(ii) upon the first conviction when the amount of marijuana involved is *at least ten pounds, but less than 50 pounds: three years in prison* and a fine of $15,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity . . . .

(iii) upon conviction when the amount of marijuana involved is *at least 50 pounds: five years in prison* and a fine of $50,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity.

18 Pa.C.S. §7508(a)(1) (emphasis added).[6]

---

[6]. Section 7508 was amended as of December 19, 1990. Since all the defendants' criminal conduct occurred prior thereto, the pre-amendment version is applicable and is cited. However, the amendments have no bearing on the issues presented since they merely add an amount of "live plants" which correspond with the marijuana weight categories listed in the statute.

Section 113(f)(2) of the Controlled Substance, Drug, Device and Cosmetic Act (hereinafter, "Drug Act") provides:

> (f) Any person who violates clause (12), (14) or [clause] (30) of subsection (a) with respect to:
>
> > (2) Any other controlled substance or counterfeit substance classified in Schedule I, II, or III, is guilty of a felony and upon conviction thereof *shall be sentenced to imprisonment not exceeding five years,* or to pay a fine not exceeding fifteen thousand dollars ($15,000), or both.[7]

35 P.S. §780-113(f)(2) (emphasis added).

The alleged inconsistency arises from the fact that §7508(a)(1)(iii) sets the *minimum* sentence for the marijuana trafficking of over fifty pounds at five years, while Section 113(f)(2) provides that five years is the *maximum* sentence for that offense. This result is incompatible with section 9756(b) of the Sentencing Code, which provides as follows:

> (b) Minimum sentence.—The court shall impose a minimum sentence of confinement *which shall not exceed one-half of the maximum sentence imposed.* (emphasis supplied).

42 Pa.C.S. §9756(b) (emphasis added).

Section 7508(a)(1)(ii) (three year minimum sentence for marijuana trafficking of between ten and fifty pounds) is equally troublesome. Section 113(f)(2) of the Drug Act sets the maximum sentence for the offense at five years, which again results in the

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[7]. The term "controlled substance" includes marijuana. *See* 35 P.S. §§780-102 and 780-104(1)(iv). Marijuana is classified in Schedule I, 35 P.S. §780-104(1)(iv), and it is not a "narcotic drug" as defined in 35 P.S. §780-102.

minimum sentence exceeding one-half of the maximum sentence.

Litzenberger[8], Bell, and Tischler (hereinafter collectively referred to as "Defendants"), along with the Defender Association of Philadelphia as amicus curiae, argue that §7508(a)(1)(ii) and (iii) cannot be constitutionally applied because the *ad hoc* judicial creation of a maximum sentence makes the penalty unduly vague and unknowable. Defendants contend that due process, guaranteed by Article I, Section 9 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution, precludes sentences without definite maximums.

The Attorney General as amicus curiae contends that the failure to provide a statutory maximum sentence does not raise constitutional concerns.[9] At

[8]. Litzenberger also raises separate issues concerning his sentence, which will be addressed *infra*.

[9]. The Attorney General, as amicus curiae, cites several federal cases and various cases from other states in which it was held that sentencing statutes are not unconstitutionally vague for failure to fix a maximum sentence. These cases are neither persuasive or controlling. It appears that the United States Supreme Court has not specifically spoken on this issue. Even assuming the Court would adopt the approach followed by the federal courts, our court would not be bound by that decision. *See, Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991).

We believe that fairness requires that a defendant be notified of the maximum sentence he could face for committing a particular offense. Otherwise, the trial judge is free to impose an arbitrary or discriminatory sentence. Moreover, a defendant who desires to plead guilty to an offense would have no indication of the wide range of punishment that the trial judge could impose or the amount of time he would have to serve until he was eligible for parole. This interpretation of our Commonwealth's due process clause rests firmly on state constitutional grounds. *See, Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

the same time, however, the Attorney General contends that a maximum sentence in the instant case is provided by 18 Pa.C.S. §1103 (which establishes 20, 10, and 7 year maximum sentences for felonies of the first, second, and third degree, respectively). To support its position that the offense at issue is a felony, the Attorney General relies on the same provision that it argues is impliedly repealed, 35 P.S. §780-113(f)(2). As noted, that provision establishes that one who violates §113(30) with respect to a controlled substance classified in Schedule I, II or III, is guilty of a *felony* punishable by a *maximum of five years* incarceration. The Attorney General cannot cite the provision for one proposition in order to trigger the application of 18 Pa.C.S. §1103, while contending that it was impliedly repealed by §7508.

In any case, §1103 does not resolve the matter. The general provisions of the Crimes Code set forth the classifications of crimes. Section 106(b)(5) states that a crime declared to be a felony, without specification of degree, is of the third degree. 18 Pa.C.S. §106(b)(5). Thus, §1103 would suggest a maximum sentence of seven years for the violations at issue. This result is inconsistent with the five year maximum set forth in §113(f)(2). Because a specific provision controls over a general one, 1 Pa.C.S. §1932, the five year maximum sentence in the Drug Act would prevail.

The Commonwealth contends that the five year minimum sentence in §7508 impliedly repeals the five year maximum sentence set forth in §113(f)(2) of the Drug Act because it was enacted later in time. 1 Pa.C.S. §1936. It contends that the minimum-maximum rule of §9756(b) of the Sentencing Code can

be given effect by assuming that the legislature intended a ten year maximum sentence since it promulgated a five year minimum.

The Commonwealth finds support for its position in the Superior Court opinions of *Commonwealth v. Morales,* 394 Pa. Super. 160, 575 A.2d 148 (1990), and *Commonwealth v. Guzman,* 417 Pa. Super. 364, 612 A.2d 524 (1992).

In *Commonwealth v. Morales,* the Superior Court held that §7508(a)(1)(iii) impliedly repealed §113(f)(2) of the Drug Act. The court went on to hold:

> Accordingly, the trial court was required to sentence appellant to a minimum term of imprisonment of five to ten years and a fine of $50,000.00. Although the statute does not explicitly set forth the maximum authorized sentence in cases to which it is applicable, we find that since "a minimum sentence of confinement . . . shall not exceed one-half of the maximum sentence imposed," 2 Pa.C.S. §9756(b), *it implicitly sets forth a maximum sentence of at least ten years imprisonment* and a fine of $100,000.00.

(emphasis added). *Id.*, 394 Pa. Super. at 162, 575 A.2d at 149.[10]

This argument is only superficially appealing. A closer analysis of §9756(b) reveals that although the minimum sentence may not *exceed* one-half of the maximum sentence, the statute does not require that

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[10]. In *Commonwealth v. Guzman,* 417 Pa. Super. 364, 612 A.2d 524 (1992), the Superior Court reaffirmed its holding in *Morales* and held that §7508(a)(3)(iii) (corresponding sentencing provision for cocaine trafficking) was constitutional and impliedly repealed the sentencing provisions set out in 35 P.S. §780-113.

the minimum sentence *equal* one-half of the maximum one. For example, a minimum sentence of five years may be a valid sentence if the prescribed maximum is ten years. However, a five year minimum sentence may also be a valid sentence if the maximum sentence is fifteen years, twenty years or one-hundred years. In all of the examples, the minimum sentence would not exceed one-half of the maximum. Thus, this interpretation would force us to engage in sheer speculation as to which maximum sentence the General Assembly intended. Similarly, the "maximum sentence of *at least* ten years imprisonment" found in *Morales* is no maximum at all; it is merely a minimum range of a maximum sentence.

A lawfully enacted statute commands a presumption of constitutionality and should be upheld unless it clearly, palpably, and plainly violates the constitution. *Commonwealth v. Blystone,* 519 Pa. 450, 549 A.2d 81 (1988), *aff'd* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed. 255 (1990).

The initial argument that §7508 impliedly repealed §113(f)(2) is based on the assumption that these provisions are irreconcilable. We find, however, that it is possible for the two provisions to be consistently applied in regards to terms of incarceration.[11]

[11]. As to the provisions regarding fines, §7508(a)(1)(iii) is clearly inconsistent with §113(f)(2) of the Drug Act. The former sets forth a fine of $50,000, while the latter provides that the fine cannot exceed $15,000. This does not change our analysis of the provisions affecting imprisonment.

The fine provisions in §7508 prevail over the fines set forth in the Drug Act since the prefatory language in §7508 directs us to disregard statutes to the contrary. *See also,* 1 Pa.C.S. §1936 (statute latest in date shall prevail).

Section 7508(a)(1)(ii)'s mandatory minimum sentence of three years read together with §113(f)(2)'s maximum five year sentence results in a three to five year sentence for individuals convicted of possession with the intent to deliver between ten and fifty pounds of marijuana.[12] Similarly, one convicted of possession with the intent to deliver at least fifty pounds of marijuana would be sentenced to a flat five year term of imprisonment (five year minimum and five year maximum). This construction provides us with a maximum sentence and therefore allows us to avoid striking the provisions as void for vagueness.

As noted, however, this result is inconsistent with §9756(b), which states that the minimum sentence cannot exceed one half of the maximum sentence. This, however, does not raise constitutional concerns. Although both parties are correct in asserting that the minimum-maximum rule of §9756(b) is a longstanding concept in our Commonwealth, it is a statutory and not a constitutional provision. Therefore, the prefatory language in §7508 providing "Notwithstanding any other provision of this or any other act to the contrary" carves an exception to the minimum-maximum rule when sentencing a defendant under §7508. The prefatory language does not compel us to disregard the term of imprisonment set forth in §113(f)(2) since it is possible for §113(f)(2) and §7508 to be consistently applied.

We find this interpretation to be the most desirable since it furthers the intent of the legislature to invoke harsher minimum penalties for drug

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[12]. The trial court judge in Litzenberger's case noted in his opinion that although he favored this approach, he found himself bound by *Commonwealth v. Morales*, 394 Pa. Super. 160, 575 A.2d 148 (1990).

trafficking, without raising constitutional concerns. We have reviewed the legislative history of §7508 and observed that the sole argument against the provision was the resulting overpopulation of the Commonwealth's prisons. The legislators did not specifically discuss the aspects of a maximum sentence for the offenses referred to in §7508 or the effect that the mandatory minimum sentences in §7508 had on the maximum sentences set forth by the Drug Act. One proponent of the legislation spoke as follows:

> [W]e who represent Pennsylvania and the society of Pennsylvania make a policy decision on the issues that we are dealing with—that is the sale of drugs. It is so great and does such a devastating social and economic and personal harm to not only our young people, but our people and our society in general, that in order to deal with this we have to try to provide some deterrents. This bill is more about deterrents than punishment . . . [T]hese are people who have these types of drugs in their possession, are people who are not the street seller but the individual who is involved in it for a business and the kind of people we all want to get off the street to prevent them from continuing their activities.

Senator Greenleaf, February 23, 1988, Legislative Journal at 1784.

Since it appears the legislature was attempting to invoke harsher penalties, we must presume that the legislature intended a five year maximum sentence as set forth in the Drug Act since it is the only constitutional maximum sentence available.

In summary, we hold that although the legislature did not expressly provide a maximum sentence in §7508(1)(a)(ii) or (iii), one can be reasonably

implied when that section is read together with §113(f)(2) of the Drug Act. The fact that this construction is contrary to §9756(b)'s minimum-maximum rule is of no constitutional moment.

Defendant Litzenberger also contends that §7508 violates Article III, Section 6 of the Pennsylvania Constitution, which states:

> No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length.

Specifically, Litzenberger argues that the implied repeal of the maximum sentence provided in §113(f)(2) violates the aforementioned constitutional provision. Since we have given effect to the maximum sentence in §113(f)(2), this claim fails.

Finally, Litzenberger contends that the Commonwealth failed to comply with the notice provision of §7508(b), which provides as follows:

> . . .Notice of the applicability of this section to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided *after conviction and before sentencing*. . . .

(emphasis added) 18 Pa.C.S. §7508(b).

Litzenberger concedes that defense counsel received a letter from a Deputy District Attorney, before trial, stating in part:

> Defendant faces a minimum mandatory sentence of 3 years and $15,000 fine. If forced to go to trial I would have to seek that minimum mandatory sentence.

He argues, however, that because he did not receive that notice "after conviction and before sentencing," the Commonwealth violated §7508(b).

Assuming the Commonwealth did technically violate the provision, the error, at most, is harmless. *See, Commonwealth v. Story,* 476 Pa. 391, 383 A.2d 155 (1978) (An error is harmless if the Commonwealth proves beyond a reasonable doubt that the defendant was not prejudiced). When arguing this issue prior to Litzenberger's sentencing, defense counsel admitted that he was not surprised that the Commonwealth was seeking the mandatory minimum sentence. Moreover, defense counsel prepared and presented to the trial judge a sentencing memorandum in opposition to the mandatory minimum sentence. Defense counsel even stated to the trial judge that there was nothing that he could do that he had not already done, and that he was not claiming prejudice due to the lack of notice. (N.T. 10/08/91, 14-20). By receiving notice prior to trial, Litzenberger was given notice earlier than is required by the statute. This claim is therefore meritless.

Accordingly, we reverse the orders of the lower courts and remand these cases for resentencing in accordance with this opinion.

Mr. Justice Castille did not participate in the consideration or decision of this case.

Mr. Justice Papadakos concurs in the result.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1801, due to the unavailability of Mr. Justice Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

APPENDIX "B"

OPINION OF THE COMMON PLEAS COURT OF ALLEGHENY COUNTY, PENNSYLVANIA, DATED OCTOBER 11, 1991

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

Case Nos.: CC9008146
CC9008151

COMMONWEALTH OF PENNSYLVANIA,

v.

STUART A. BELL.

Case Nos.: CC9008122
CC9008149

COMMONWEALTH OF PENNSYLVANIA,

v.

CHARLES A. TISCHLER.

OPINION RE: SENTENCING

HON. JEFFREY A. MANNING

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MANNING, J. October 11, 1991

Before the Court are the respective Motions to Bar Imposition of Mandatory Sentence of defendants Charles Tischler and Stuart Bell. For the reasons set forth herein these motions will, in part, be granted.

On September 11, 1991 following a bench trial defendants Tischler and Bell were adjudged guilty of Possession of 116 pounds of marijuana, a Controlled Substance with Intent to Deliver, in violation of Section 13a(30) Controlled Substance Drug, Device & Cosmetic Act. The Commonwealth gave timely notice of its "intention to proceed"[1] under the mandatory sentencing provisions established by 18 Pa.C.S. 7508. The Court found that the mandatory sentencing provisions set forth in 18 Pa.C.S. 7508(a)(1)(iii) are applicable in this case. The Court finds further that the applicable mandatory sentence is in direct contradiction with the sentencing scheme long established by the legislature and, more importantly, deprives the defendants of the due process of law.

[1] This Court has previously held that the mandatory sentencing provisions are applicable absent the Commonwealth's filing of the required notice. See *Commonwealth v. Biddle,* CC No. 8900747 appeal pending at Superior Court, 1631 PGH 90.

In pertinent part, 18 Pa.C.S. 7508(a)(1)(iii) provides that:

> (a) General rule—Notwithstanding any other provisions of this or *any other act to the contrary,* the following provisions shall apply: (emphasis added)
>
> > (1) A person who is convicted of violating section 13(a)(14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, where the controlled substance is marijuana shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection . . .
> >
> > > (iii) upon conviction when the amount of marijuana involved is at least 50 pounds: five years in prison and a fine of $50,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity.

Among the statutory provisions which are "to the contrary" and which this Court is directed to ignore is Section 13(f)(2) of the Controlled Substance, Drug, Device and Cosmetic Act. This section provides:

> (f) Any person who violates clause (12), (14) or [clause] (30) of subsection (a) with respect to: . . .
>
> > (2) Any other controlled substance or counterfeit substance classified in Schedule I, II, or III, is guilty of a felony and upon conviction thereof shall be sentenced to imprisonment not exceeding five years, or to pay a fine not exceeding fifteen thousand dollars ($15,000), or both.

The other section that is excluded from the Court's consideration is the Sentencing Code section at 42 Pa.C.S. 9756(a) and (b):

> (a) General rule.—In imposing a sentence of total confinement the court shall at the time of sentencing specify any maximum period *up to the limit authorized by law* and whether the sentence shall commence in a correctional or other appropriate institution.
>
> (b) Minimum sentence.—The court shall impose a minimum sentence of confinement *which shall not exceed one-half of the maximum sentence imposed.* (emphasis supplied).

These three statutes constitute the present statutory scheme for sentencing in the illegal delivery and/or possession with intent to deliver 50 or more pounds of marijuana. The sentence mandated by 18 Pa.C.S. 7508(a)(1)(iii) is not ony inconsistent with the other two statutes but is also inconsistent with the panoply of penal statute found throughout the legislative enactments of this Commonwealth.

Since at least 1974 in Pennsylvania, the statutory scheme for sentencing persons convicted of misdemeanors and felonies has been governed by the language of the Sentencing Code 42 Pa.C.S. 9701 *et seq.* For each and every criminal statute the legislature has adopted a specific maximum penalty which cannot be exceeded. In doing so they have also statutorily incorporated a minimum sentence which may be less than, but cannot exceed one-half of the maximum.

The minimum sentence is vitally important in fixing the earliest parole eligibility date and the length of actual confinement that an eligible and otherwise well behaved inmate is required to serve.

In this case, the mandatory sentencing statute makes the minimum sentence (5 years), the same period of confinement as the drug statute's maximum sentence (5 years), in total derogation of Pennsylvania's sentencing scheme.

A sentence of confinement where the minimum exceeds one-half of the maximum has long been held to be illegal. See *Commonwealth v. Phillips,* 258 Pa. Super. 109, 392 A.2d 708 (1978) (a minimum sentence of confinement shall not exceed one-half of the maximum sentence imposed) and *Commonwealth v. Aeschbacher,* _____ Pa. Super. _____, 419 A.2d 596, 597 (1980). In addition, the imposition of a sentence providing only for a maximum term of imprisonment is likewise an illegal sentence. See *Commonwealth v. Shoemaker,* _____ Pa. Super. _____, 449 A.2d 669 (1982).

We note that in *Commonwealth v. Morales,* _____ Pa. Super. _____, 575 A.2d 148, 149 (1990) a panel of our Superior Court acknowledged that 18 Pa.C.S. 7508 "does not *explicitly* set forth the maximum authorized sentence in cases to which it is applicable . . ." (emphasis added). The *Morales* panel nevertheless determined that the *implicit* maximum sentence under 18 Pa.C.S. 7508(a)(1)(iii) is a sentence of at least ten years imprisonment and a fine of $100,000.00 (*Id*), simply doubling the mandatory minimum. While this analysis is insightful and logically sound, it fails to take into account the Court's obligation with respect to the construction and interpretation of statutes and the ascertainment of Legislative intent. See, 1 Pa.C.S. 1901 *et seq.*; *Commonwealth v. Wooten,* 519 Pa. 45, 545 A.2d 876 (1988); *Commonwealth v. Broughton,* 257 Pa. Super.

369, 390 A.2d 1282 (1978) and *Commonwealth v. Snyder,* 385 Pa. Super. 58, 560 A.2d 165 (1989). With all due respect to our esteemed and learned brethren on the Superior Court, the *Morales* holding simply invents a maximum sentence where one does not exist. While Courts have an obligation to interpret the acts of legislatures, they should not usurp the law-making responsibility.

This mandatory sentencing statute, further, fails to guard against the capricious, frightening and repugnant prospect that a sentencing judge might decide the maximum sentence is or should be 20, 40, 80 or 160 years. Likewise, since the statute requires the Court to impose "at least" five years, it leaves open the possibility that a Court might impose a longer minimum sentence, unimpeded by the cap of one-half the maximum. The Court finds that 18 Pa.C.S. 7508(1)(a)(iii), in requiring the imposition of an explicit minimum mandatory sentence without an explicit limitation on the maximum sentence, is void for vagueness and denies the defendants due process of law.

It is settled that the sentencing process is subject to the due process clause. *Commonwealth v. Taylor,* _____ Pa. Super. _____, 500 A.2d 110, 113 (1985) citing *Gardner v. Florida,* 430 U.S. 349, 97 S. Ct. 1197 (1977) and *Morrissey v. Brewer,* 408 U.S. 349, 92 S. Ct. 2593 (1972). Moreover, "If the sentencing procedure is improper, it involves deprivation of due process." *Commonwealth v. Taylor,* 500 A.2d at 113 citing *Commonwealth v. Walker,* 286 Pa. Super. 239, 428 A.2d 661 (1981). The failure of the legislature to establish an explicit maximum sentence with respect to 18 Pa.C.S. 7508(a)(1)(iii) violates basic due process

rights guaranteed by Article 1, section 9 of the Pennsylvania Constitution and the Fifth and Fourteenth Amendments of the Constitution of the United States.

The void for vagueness doctrine, is "a due process doctrine incorporating notions of fair notice and warning." *Commonwealth v. Potts,* _____ Pa. Super. _____, 460 A.2d 1127, 1133 (1983) citing *Smith v. Goguen,* 415 U.S. 566, 94 S. Ct. 1242 (1974). The void for vagueness doctrine, where applied in the criminal law, usually involves the interpretation of statutes prohibiting particular activities as criminal. For example, "a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden is so indefinite that it encourages arbitrary or erratic arrest or conviction and is void for vagueness." *Commonwealth v. Stein,* _____ Pa. _____, 546 A.2d 36, 40 (1988) citing *Colautti v. Franklin,* 439 U.S. 379, 99 S. Ct. 675 (1979). By analogy, an enactment authorizing the imposition of a term of imprisonment *must* specify the maximum sentence that may be imposed in order to afford the defendant fair notice and warning of the possible duration of punishment.

The "touchstone of due process is protection of the individual against arbitrary government action." *Commonwealth v. Heck,* _____ Pa. Super. _____, 491 A.2d 212, 219 (1985) citing *Wolff v. McDonald,* 418 U.S. 539, 94 S. Ct. 2963 and *Commonwealth v. Hernandez,* _____ Pa. Super. _____, 488 A.2d 293 (1985). The absence of an explicit maximum sentence allows for the imposition of arbitrary and excessive sentences. This foreboding prospect is alien to every concept of fairness embodied in the Anglo-American legal tradition.

Having determined that the minimum imprisonment provision of subsection (iii) is unconstitutional, the Court is obliged to follow the legislature's intention to require mandatory sentencing and, further, to determine whether the "lesser included" penalty sections of the statute are applicable.

In this analysis the Court relies specifically upon the requirements of 1 Pa.C.S.A. 1925, which holds, in essence, that the provisions of any statute are severable and unaffected by void provisions unless the intent of the legislative is violated or the statute is otherwise incomprehensible. 18 Pa.C.S. 7508(a)(ii) states:

> (ii) when the amount of marijuana involved is at least ten pounds, but less than 50 pounds, or at least 21 live plants but less than 51 live plants; three years in prison and a fine of $15,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; . . .

This section is likewise unconstitutional since it calls for a mandatory minimum sentence (3 years) which exceeds one-half of the maximum sentence (5 years).[2]

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[2] A review of the remaining parts of the mandatory drug sentencing statute discloses no other constitutionally offensive provisions except to the extent that mandatory sentences themselves are offensive since they are ". . .rigid and invariable [rather than] allowing room for good judgment by the judge, made acquainted by the trial with the attending circumstances." (quoting *Commonwealth v. Taylor*, _____ Pa. Super. _____, 500 A.2d 110, 113 (1985), upholding mandatory sentencing statutes).

18 Pa.C.S. 7508(a)(a)(i) provides:

> (i) upon the first conviction when the amount of marijuana involved is at least two pounds, but less than ten pounds: one year in prison and a fine of $5,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; . . .

This section is clearly constitutional, the minimum mandatory sentence not exceeding one-half of the maximum. The question then becomes one of whether the phrase "when the amount of marijuana involved is *at least* two pounds, *but less than* ten pounds . . ." applies to a case involving more than 50 pounds where the enhanced penalty for such an amount is unconstitutional. In this case 116 pounds of marijuana is undeniably "at least two . . ." "but [surely is not] less than ten pounds . . ." Section 1928(b)(1) of Title 1 of the Pennsylvania statutes requires the Court to "strictly construe" penal provisions. Such an interpretation would dictate that subsection (i) is applicable only to cases involving more than 2 pounds and less than 10 pounds.

There is no doubt from the legislative history, however, that the representatives of the people sought to impose increasingly severe mandatory minimum punishments for ever increasing levels of drug trafficking. Accordingly the Court cannot ignore the dictates of 7508(1)(a)(i) in fixing the appropriate penalty in this case.

This Court also finds that the provision of 18 Pa.C.S. 7508(1)(a)(iii) which requires the imposition of a fine is not inapplicable nor violative of due process. The legislature has provided the Court with an explicit and definite monetary amount of the fine to be assessed in this matter.

For the foregoing reasons the defendants' Motions to Bar the Imposition of the Mandatory Sentence of imprisonment of 18 Pa.C.S. 7508(a)(1)(iii) are GRANTED.

BY THE COURT

JEFFREY A. MANNING, *J.*

APPENDIX "C"

ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING APPLICATION FOR REARGUMENT, DATED SEPTEMBER 13, 1994

[J-49-1994]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN/EASTERN DISTRICTS

No. 35 Western District Appeal Docket 1992

Application for Reargument

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

STUART A. BELL,
Appellee.

No. 36 Western District Appeal Docket 1992

Application for Reargument

COMMONWEALTH OF PENNSYLVANIA,
Appellant,

v.

CHARLES A. TISCHLER,
Appellee.

ORDER

PER CURIAM

AND NOW, this 13th day of September, 1994, the Application for Reargument is denied.

Mr. Justice Castille did not participate in the consideration or decision of this case.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1801, due to the unavailability of Mr. Justice Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

A True Copy Irma T. Gardner
As of: September 13, 1994
Test: IRMA T. GARDNER
Deputy Prothonotary,
Supreme Court of Pennsylvania